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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-255

SANTE FE PACIFIC RAILROAD COMPANY, a corporation,
Petitioner,

vs.

E. L. CORD and DONALD R. WHEELER, Trustee,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court and the Court of Appeals, of the State of Arizona.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

Respondents hereby file their brief in opposition to the Petition for Certiorari. The Petitioner Santa Fe Pacific Railroad Company—will be hereinafter referred to as "Santa Fe"; the Respondent E. L. Cord as "Cord", and the Respondent Donald R. Wheeler as Trustee as "Wheeler". Cord and Wheeler will sometimes hereinafter be referred to jointly as "Respondents".

Jurisdiction.

The judgment of the Superior Court of the County of Yavapai, State of Arizona, was entered on June 19, 1969 (A. 40) and an appeal was timely made to the Court of Appeals of the State of Arizona by Santa Fe on July 22, 1969. Thereafter on March 15, 1971, the said Court of Appeals affirmed the judgment of the

Superior Court of the County of Yavapai. (A. 3, 5.) On March 30, 1971, Santa Fe filed a Motion for Rehearing in the said Court of Appeals which Motion was denied on April 14, 1971. (A. 28.) On April 20, 1971, Santa Fe filed a Petition for Review to the Supreme Court of the State of Arizona, which Petition for Review was denied on June 9, 1971. (A. 1.)

This Court lacks jurisdiction as the State judgment was based upon non-federal grounds.

Questions Presented.

(1) Is the State Court Judgment based upon a breach of contract of sale, an independent non-federal ground adequate in itself to support the state court's judgment?

(2) Whether Forest Lieu Selection Rights arising under the Act of June 4, 1897 (30 Stat. 36) and based upon lands patented to Santa Fe by the U.S. Government not later than the year 1906 were terminated under the provisions of Sec. 321 (b) of the Transportation Act of 1940, and the release executed by Santa Fe pursuant to said Transportation Act?

Statute Involved.

The Forest Lieu Exchange Act of June 4, 1897 (30 Stat. 36):

> That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no

charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further,* That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

Supplemental Statement of Case.

Pursuant to the Forest Lieu Exchange Act of Congress, Santa Fe during the years 1902 to 1910 conveyed to the United States certain patented lands (hereinafter referred to as "base lands") to which it then had title, and in exchange therefor Santa Fe received from the United States, rights to select lands owned by the United States. Commencing during the year 1902 to 1917 Santa Fe sold all of their interest in these selection rights including the right to rescind the exchange with the Government, to third persons for a valuable consideration, impliedly warranting at the time of sale that Santa Fe would do nothing to impair, destroy or diminish the use of said rights. Cord and Wheeler subsequently became the owners of said rights sold by Santa Fe. During the years 1955, 1956 and 1957, at the request of Santa Fe, and without the knowledge and consent of Cord and Wheeler or their predecessors, the base lands which Santa Fe had conveyed to the Government in exchange for the Forest Lieu Selection Rights were reconveyed by the United States Government to Santa Fe. The Government refused to recognize Cord's and Wheeler's selection rights since the base lands had been reconveyed by the United States Government to Santa Fe.

All of the "base lands" reconveyed by the United States Government to Santa Fe which Santa Fe had not conveyed to third parties were awarded by the Trial Court to Santa Fe free and clear of any claims of Cord and Wheeler.

Cord and Wheeler filed suit against Santa Fe for damages, claiming breach of contract of sale and fraudulent conversion of personal property.[1]

Santa Fe only appealed from certain parts of the judgment of the Trial Court. First, as to the amount of damages awarded by the Trial Court to Cord and Wheeler (paragraphs 5 and 6, A. 44), and second, from that part of the judgment that held Santa Fe was the owner of certain base lands as described and referred to in the State Court Judgment. (Paragraph 3, A. 42).

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[1]The State Court rejected Respondent's claim of conversion of personal property and for punitive damages, and based its judgment upon breach of contract.

ARGUMENT.

REASONS FOR DENYING THE WRIT.

1. The Judgment of the State Court Is Based Upon Adequate and Independent Non-Federal Grounds Not Subject to Review.

Two Federal Statutes lurked in the background of this case, that is the Forest Lieu Exchange Act of 1897 (30 Stat. 36), and the Transportation Act of 1940 (49 U.S.C. 65). The controlling statute from which the claims of Cord and Wheeler arose or stemmed from is the said Forest Lieu Exchange Act. A decision on the question presented by Santa Fe for review by this Court was not essential to the State Court Judgment. It is apparent from the record that the judgment of the State Court was not based upon any provision of the Transportation Act of 1940. This was made clear in the opinion of the Appeals Court.

> "The claim which Cord and Wheeler had under the Act of June 4, 1897, 30 State. 36, *is a claim, separate and apart from any claims under the Transportation Act of 1940.* * * *" (A. 18.)

The subject matter of this controversy is not inherently federal. The theory of liability of the Trial Court as affirmed by the Court of Appeals was simply a breach of contract of sale. Santa Fe admits that it is liable only for a breach of contract and the sole cause of action in this case is one for breach of contract, and damages awarded accordingly. (Santa Fe's Reply Br., Appeals Court, pp. 24, 25 and 27.)

The Trial Court found that the Forest Lieu Selection Rights as sold by Santa Fe constituted binding and enforceable contracts of sale between Santa Fe and the owners of such rights, and their successors

and assigns. (Conc. #5, A. 38.) That at the time Santa Fe sold said rights it impliedly warranted that it would not do anything to impair, destroy or diminish such selection rights, (Con. #7, A. 38) and that Santa Fe breached the contract with the holders and owners of said rights when it took back the base lands from the United States Government and destroyed the rights to select other federal lands in exchange. [Fdg. #16, A. 36, and Conc. #8, A. 38.][2]

The Findings, Conclusions and Judgment of the State Court are amply supported by undisputed evidence, and we submit are inherently correct, and would not by themselves warrant review by this Court. On these facts the decision below is clearly correct.

Santa Fe does not contend that the State Courts erroneously construed or applied the Forest Lieu Statute, and therefore the State judgment is wrong and should be reviewed.

The established rule is that this Court will not review a State Court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved: *Murdock v. Memphis*, 20 Wall. 590, 636; *Eustis v. Bolles*, 150 U.S. 361, 370; *Black v. Cutter Laboratories*, 351 U.S. 292, 298; *Henry v. State of Mississippi*, 379 U.S. 443.

It is clear that the state judgment is sustainable upon substantive state grounds.

The total effect of Santa Fe's petition is that this Court should review an opinion of the State Court of Appeals which discussed a federal question not ger-

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[2]In accord *Udall v. Battle Mountain Company*, 385 F.2d 90 (9th Cir. 1967, Cert. den) and reaffirmed in *Lade v. Udall*, 432 F.2d 254 (9th Cir.).

mane to the affirmance of the judgment of the Trial Court. (A. 14-19.)

The power of the Supreme Court is to correct a wrong judgment based on federal grounds, and not merely to revise opinions based on non-federal grounds. In *Black v. Cutter Laboratories,* 351 U.S. 292, 297-98, this Court stated:

> This Court, however, reviews judgments, not statements in opinions. * * * This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds.

See also *Herb v. Pitcairn,* 324 U.S. 117, 125.

In addition, one of the indirect purposes of Santa Fe's petition to this Court is an attempt to establish a defense based upon the Statute of Limitations of the State of Arizona, which is a purely local or state procedural matter, already decided by the State Court adversely to Santa Fe.

Santa Fe has not sustained the burden to estabblish jurisdiction of this Court, as Santa Fe has failed to demonstrate in its Petition that the State ground of breach of contract was not a substantial and sufficient ground to sustain the judgment below. *Durley v. Mayo,* 351 U.S. 277, 281.

2. There Is No Important or Substantial Question of Federal Law.

Manifestly there is no important or substantial question of Federal law constitutional or otherwise requiring a decision by this Court.

The construction of a local contract or an action for damages for breach of contract under local law does

not present a substantial federal question. *Black v. Cutter Laboratories*, 351 U.S. 292, 299; *Selover, Bates and Co. v. Walsh*, 226 U.S. 112; *Kryger v. Wilson*, 242 U.S. 171.

Santa Fe asserts in effect that this Court decided the importance of this question presented herein twenty-four years ago because this Court granted certiorari in the case of *Krug v. Santa Fe Pacific Railway Co.*, 329 U.S. 591 (1924) which involved a question arising under the Transportation Act of 1940 (Santa Fe's Point 1). This bold assumption that this Petition is therefore "Certworthy" is clearly erroneous thinking. This is a private controvery, not involving the U.S. Government arising out of a breach of contract, and this case, is not the same type of controversy presented in the *Krug* case of vital national importance affecting the title of the U.S. Government and homesteaders to a vast number of acres of lieu or indemnity lands arising out of land grants by Congress to seventy railroads almost equal in acreage to the size of the New England States, New York, and Pennsylvania combined.

Santa Fe has totally failed to show that the question presented is of any immediate or major importance or of wide import far beyond the particular facts and parties involved, and Santa Fe has failed to show in any manner why it is vital for this Court to finally decide the issue presented, except for Santa Fe's personal benefit.

Santa Fe has elected to file this Petition regardless of the fact that it admits liability to Cord and Wheeler and all that Santa Fe is endeavoring to do as the main thrust of its Petition is to have this Court rule otherwise on the effect of the Transportation Act and

the release executed thereunder, so that Santa Fe can reduce or mitigate its damages. In Santa Fe's brief filed in the Court of Appeals its position as to reducing or mitigating damages was made clear as Santa Fe stated:

> The court should hold that the lands Santa Fe received back from the United States and which it still holds, it holds in trust for Cord and Wheeler. * * * To the extent that any of such lands so received by the Santa Fe have been acquired by others than Santa Fe is subject to liability for the loss of such lands. (Santa Fe's Op. Br. p. 55.)

Santa Fe by second guessing to bolster its argument further asserts that issue presented is important as the Secretary of Interior should refuse to honor *unexercised* Forest Lieu Selection Rights under the Act of Aug. 31, 1964, (78 Stat. 151) if Santa Fe's position is correct, and accordingly the United States has an interest in obtaining a final answer on the issue raised: (Santa Fe's Point 3.) This is speculation and conjecture beyond the realm of actuality. A decision by this Court on the issue raised by Santa Fe on the utilization of *unrealized* Forest Lieu Rights on public lands is not important, but in fact is now moot and episodic.

No decision is needed on this issue by this Court, as Congress has already declared under Sec. 1 of the Act of August 31, 1964 (78 Stat. 751) that any unexercised Forest Lieu Selection Rights which shall not be satisfied by land patent or cash payment before January 1, 1970, "*shall become null and void.*" Therefore the Secretary of Interior would by mandate of Congress declare null and void any claim made for these unexercised selection rights after January 1, 1970.

Only 5073 acres of Forest Lieu Selection rights were recorded under the Act of August 5, 1955 (U.S. Senate Report on Bill S 2321 dated August 18, 1965). Approximately 1500 acres or 34% of these recorded rights were involved in this controversy. Presumably the small remaining balance of these unrealized selection rights were liquidated as provided in the August 31, 1964, Act prior to January 1, 1970, otherwise they are now null and void.

3. There Is No Conflict of Decisions.

Santa Fe claims a direct conflict of decisions between the Court of Appeals' opinion and the case of *Krug v. Santa Fe Railway Co.*, 329 U.S. 591. (Santa Fe's Point 2.) Such an assertion is a confrontation with hope, not fact or reality. The State judgment was based on breach of contract, not the *Krug* case or the Transportation Act of 1940. That there is no such conflict was made clear in the Appeals Court Opinion which stated: "The claim which Cord and Wheeler had * * * is a claim separate and apart from any claims under the Transportation Act of 1940." (A. 18.) The State Court judgment does not conflict in any way with the *Krug* case.

The Forest Lieu Exchange Act was not a grant of land to anyone and not to a railroad as such. (30 Stat. 36) As the Court of Appeals noted in its opinion the Forest Lieu Exchange Act "pertained to railroads and private individuals alike, whereas the Transportation Act of 1940 was dealing only with railroads *as a railroad*", and land grants in aid of construction of railroads.

While the Appeals Court did discuss the *Krug* case and the Transportation Act, nothing in its opinion was

contrary to the principles enunciated by this Court in the *Krug* case, and as limited to the facts of that case.

In the well-considered and reasoned legal opinion, the Appeals Court correctly held that the *Krug* case and the Transportation Act were not applicable to the facts of this case (A. 14-19.) There is a definite distinction between unperfected rights (claims for indemnity or lieu lands) arising out of floating land grants to railroads in aid of the construction thereof, and rights arising out of or incident to previously patented government lands used as the basis for the Forest Lieu Exchanges. The Transportation Act and the release of Santa Fe expressly expected *lands which had been previously patented,* and the Appeals Court so held in its opinion. This construction was in accord with the construction placed thereon by the Secretary of Interior as approved by this Court in the *Krug* case, that releases in conformity with the Transportation Act were broad, incluuding all rights growing out of, or arising from the grants, *except* three types of claims specifically excluded therefrom, one of the types being *patented lands.* (Pet. Br. p. 15.) Further, Santa Fe admits that "there was no release of the base lands which had been previously patented" (that is by the U.S. Government to Santa Fe) "nor was one required under the Act." [Santa Fe's Post-trial Memo, p. 10, R. 178.]

The Forest Lieu Exchange Act created separate and distinct claims or rights divorced by statutory enactment from any claim for "compensation or reimbursement" under the Transportation Act because no such claim did or could exist based on lands which had been theretofore patented to Santa Fe by the Government and which were expressly excluded from the Transportation Act. Nothing remained for the Government to

do to reimburse Santa Fe as "compensation or reimbursement", since the patented lands had already been deeded to Santa Fe in fulfillment of the contractual obligation of the Government under the original land grant.

It is apparent from the record that Cord and Wheeler did not raise the same arguments in this litigation as those raised in Santa Fe in the *Krug* case as an entirely different factual situation existed, that is, patented lands were involved in this controversy which were used as the basis for the Forest Lieu Selection Rights while the *Krug* case involved inchoate, unperfected lieu or indemnity selections under floating grants made specifically to railroads in aid of construction thereof.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied and that this Court lacks jurisdiction as the State Court judgment was based upon adequate and independent non-federal grounds.

Respectfully submitted,

EDWARD D. NEUHOFF,

Counsel for Respondents.